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No. 83-1241

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROY E. DAVIS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioner's action under the Federal Tort Claims Act for damages to compensate for the government's alleged violation of the Clean Water Act's pollutant discharge restrictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-44a) is reported at 722 F. 2d 1157. The opinion of the district court (Pet. App. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeal was entered on September 14, 1983. The petition for a writ of certiorari was filed as of December 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b), originally enacted as part of the Federal Tort Claims Act, and portions of Section 505 of the Clean Water Act, 33 U.S.C. 1365, are set forth at Pet. App. 31a-32a, 34a-37a.

STATEMENT

1. Petitioner instituted this action in the United States District Court for the Eastern District of Virginia in October 1980. He sought damages against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 28 U.S.C. (& Supp. V) 2671 *et seq.*, for alleged violations of the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*, by the United States Air Force at Langley Air Force Base in Virginia. Petitioner buys polluted clams and transplants them from polluted waters to the Back River in Virginia where the clams are cleansed and resold. Langley Air Force Base, which fronts on the Back River, operates a sewage collection system and pumping facility through which sewage and wastes are pumped into sewage lines owned and operated by the Hampton Roads Sanitation District, also a defendant in the district court. Pet. App. 31a-32a, 40a-41a.

2. On June 22, 1979, the United States Environmental Protection Agency (EPA) issued a notice of violation and order for compliance to Langley Air Force Base. EPA found that in recent years because of increased pressure during heavy rains, Langley had been unable to pump all of its sewage into the Sanitation District's system, resulting in sewage overflow in violation of the Clean Water Act.[1] EPA's order directed Langley to identify the causes of past releases of untreated sewage and to plan preventive actions. It also required Langley to submit to EPA and the Virginia State Water Control Board a schedule for expeditious compliance with Virginia's sewage regulations. Langley notified EPA of the actions it was taking to alleviate the

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[1] We are lodging with the Court a separate addendum of documents that were filed in *Davis* v. *United States*, No. 79-113-NN (E.D. Va), the companion case to the instant action. The EPA orders, as well as pleadings and orders in No. 79-113-NN, may be found in the addendum.

problem. However, Langley noted that it was having difficulty pumping sewage into the Sanitation District's force main because of high pressures in the main that caused overloading and resulted in untreated discharges. Langley also asserted that other point-source discharges from Hampton contributed to sewage discharges into the Back River.

Prior to the commencement of the present action, petitioner had filed another suit in the Eastern District of Virginia (No. 79-113-NN) against the Air Force and the EPA, invoking the "citizen suit" provision in Section 505 of the Clean Water Act, 33 U.S.C. 1365. Thereafter, the Commonwealth of Virginia intervened as a plaintiff in No. 79-113-NN, naming Langley, the Sanitation District, and the Cities of Hampton and Newport News as defendants and alleging violations of the Clean Water Act. The Commonwealth agreed to dismiss its suit after an adequate program commenced for elimination of infiltration and inflow.

On December 2, 1980, the EPA issued an extension order to Langley. It found that Langley had made a substantial and good faith effort to comply with the June 22, 1979 order and the requirements of the Clean Water Act. Beause of the corrective actions taken by Langley, Hampton and other users of the Sanitation District's system, the agency found that no overflow had occurred since December 1979. EPA therefore extended the time for Langley to achieve complete compliance. As a result of these actions by EPA, on January 27, 1981, petitioner entered into a consent decree with EPA and the Air Force to dismiss No. 79-113-NN. In this consent decree, petitioner expressly concurred that the actions of the EPA were "adequate and reasonable based on current circumstances." The consent decree further stated that it should not be construed to be an admission of

liability by any agency of the United States. Consequently, the district court entered an order dismissing No. 79-113-NN.

3. While No. 79-113-NN was still pending petitioner filed the present complaint against the United States and the City of Hampton (Pet. App. 2a-13a). With respect to the United States, the new complaint alleged the same violations of the Clean Water Act by Langley—the discharge of untreated sewage into the Back River—that were asserted in No. 79-113-NN. These violations of the Act, the complaint alleged, caused the closing of Back River by the Commonwealth of Virginia and therefore of petitioner's shellfish business (Pet. App. 4a-6a, paras. 7, 9, 11). As a result of this alleged breach by the United States of its supposed duty not to injure petitioner by a "wrongful discharge of sewage into a navigable river in violation of the [Clean Water Act]"[2] (Pet. App. 6a, paragraph 11), petitioner claimed $321,852 as damages against the United States pursuant to the Tort Claims Act as compensation for his loss of business (Pet. App. 2a-3a, 11a, para. 22).[3]

The United States moved to dismiss the complaint. The district court granted the motion, relying on only one of the several grounds urged by the government—that the complaint failed to state a claim upon which relief could be granted (Pet. App. 32a).[4] The district court held that

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[2]Petitioner refers to the Clean Water Act as the Federal Water Pollution Control Act. Both designations may properly be used to describe the Act. See Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566.

[3]Petitioner had previously submitted an administrative claim for damages as required by the Tort Claims Act. The Air Force denied the tort claim on May 6, 1980 (Pet. App. 7a-8a), on the ground that there was no negligence in the discharge of untreated sewage.

[4]Thus, petitioner is incorrect when he asserts (Pet. 9-10) that the court dismissed the case because it lacked "tort jurisdiction."

petitioner's action for damages under the Tort Claims Act, based upon a violation of the Clean Water Act, was barred by *Middlesex County Sewerage Authority* v. *National Sea Clammers Association (Sea Clammers)*, 453 U.S. 1 (1981), and *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981). The district court noted that *Sea Clammers* and *Milwaukee* held that the citizen suit provision of Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), is the exclusive remedy for private citizens for violations of that Act, and preempts private claims under federal common law or statute (Pet. App. 33a-36a). Since all claims against the United States were dismissed, eliminating the federal causes of action, the court also dismissed without prejudice petitioner's pendent claim against the City of Hampton (*id.* at 36a-37a).

4. The court of appeals affirmed (Pet. App. 38a-44a). It agreed with the district court that petitioner was, in the guise of a federal tort claim, seeking a private remedy for violation of the Clean Water Act, a course barred by *Sea Clammers*. Since petitioner's complaint based the right of recovery solely on Clean Water Act violations, and contained no allegations of negligence or wrongful conduct other than Clean Water Act violations, the court of appeals held that the district court correctly dismissed the action for failure to state a claim (Pet. App. 43a-44a).

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner seeks to have this Court decide an issue that was not raised by his complaint and was not decided by the lower courts. Petitioner concedes (Pet. 9-12), as he did below, that this Court's decision in *Sea Clammers* bars any private cause of action to remedy violations of the Clean

Water Act other than actions properly brought under the citizen suit provision of Section 505(a) of that Act, 33 U.S.C. 1365(a). Petitioner argues, however, that *Sea Clammers* did not eliminate "separate, independent and long standing remedies for damage caused by the tortious misconduct of the government" under the Tort Claims Act (Pet. 12-13), and asserts that his claim was not based on violations of the Clean Water Act, but on *negligent* pollution of the Back River (*id.* at 12-14). This is incorrect.

Petitioner's complaint did not allege any negligent action cognizable under the Virginia common law of tort. His federal tort claim was based solely on "the wrongful discharge of sewage into a navigable river *in violation of the [Clean Water Act]*" (Pet. App. 6a (emphasis added)). This was the allegation that the district court (Pet. App. 32a) and court of appeals (*id.* at 40a, 44a) addressed.[5]

2. As a result of his change in tactics petitioner apparently does not challenge the holdings made below that this Court's decisions in *Sea Clammers* and *Milwaukee* stand as a bar to his action based on violations of the Clean Water Act. The concession is compelled. "The establishment [in the Clean Water Act] of such a self-consciously comprehensive program" for the regulation of water pollution was intended by Congress to preempt any private right of action under federal common law to remedy any matter addressed

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[5]It is doubtful that petitioner could have asserted a negligent tort against the government. The government denied petitioner's administrative claim for damages because it found that whatever pollution may have occurred was not due to the negligent operation by Langley of its sewage pumping facilities. A federal tort claim must be based on a claim of negligent conduct by government employees, as opposed to other, non-negligent, torts such as the creation of a nuisance. See 28 U.S.C. 1346(b), 2674; *Flanagan* v. *Gregory and Poole, Inc.*, 136 W. Va. 554, 562, 67 S.E. 2d 865, 871 (1951) (defining nuisance as the violation of an absolute duty, which may occur when the best of care is taken).

by the Act. *City of Milwaukee* v. *Illinois*, 451 U.S. at 319, 320. *Sea Clammers*, like the instant case, was a suit for damages to remedy violations of the Clean Water Act. This Court held (453 U.S. at 14) that recovery of damages for violations of the Act was not permitted:

> In view of the elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the Clean Water Act].

The Court there also considered, sua sponte, an alternative statutory basis for the recovery of damages for violations of the Act—42 U.S.C. (Supp. V) 1983, which authorizes recovery of damages against state officials for civil rights violations.[6] The Court found that recovery of damages was barred for violations of the Clean Water Act under 42 U.S.C. (Supp. V, 1983 or any other statute. 453 U.S. at 20-21.[7] Thus, it is beyond dispute that petitioner may not pursue an action under the Tort Claims Act seeking compensation for the government's alleged violation of the Clean Water Act.[8]

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[6]See *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

[7]Petitioner correctly notes (Pet. 14) that Tort Claims Act recovery for Clean Water Act violations was not addressed in *Sea Clammers* because the federal tort claim was dismissed in the court of appeals as not timely. *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222, 1236 (3d Cir. 1980). However, given this Court's broad language in both *Milwaukee* and *Sea Clammers* regarding the preemptive nature of the Clean Water Act in matters involving the enforcement of its provisions, we cannot suppose a Tort Claims Act suit to remedy violations of the Clean Water Act would be treated differently from a civil rights suit under 42 U.S.C. (Supp. V) 1983.

[8]Petitioner contends (Pet. 18) that the same issue is raised in other actions pending in the district courts and that, therefore, his petition should be granted. Plaintiffs in *Kelley* v. *United States*, No. 79-10199 (E.D. Mich.) did raise a claim similar to petitioner's, but it was resolved by a consent decree. In *Dickerson, Inc.* v. *American Electric Corp.*, No. 82-244-Civ-J-B (M.D. Fla.), plaintiffs claimed damages against the

This result is not altered by the savings clause in Section 505(e) of the Clean Water Act, 33 U.S.C.1365(e), referred to by petitioner (Pet. 15-17), which states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief against the Administrator or a State Agency).

Petitioner's contention conflicts with this Court's decisions in *Milwaukee*, 451 U.S. at 328-329 and *Sea Clammers*, 453 U.S. at 20-21 n.31. Actions preserved by Section 505 are for enforcement of *other* "anti-pollution standards arising under *other* statutes or state common law," but not other *remedies* for the enforcement of the Clean Water Act. *Sea Clammers*, 453 U.S. at 20 n. 31.[9]

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private defendants for violating the Clean Water Act. But the claim against the United States was a federal tort claim for damages based on the government's alleged negligence. Therefore, *Dickerson* does not involve precisely the same issue presented here.

[9] *Hough* v. *Marsh*, 557 F. Supp. 74 (D. Mass. 1982), cited by petitioner (Pet. 13), does not present a square conflict with the lower court rulings here. There, plaintiffs sought review under the Administrative Procedure Act (APA), 5 U.S.C. 701-706, of a decision by the Corps of Engineers to issue a permit, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. (Supp. V) 1344, to a party seeking to deposit landfill in a wetland. The court correctly held the action under the APA should not be dismissed because of the preemptive effect of the Clean Water Act's citizen suit provision. It found that Section 505 had no application to review of agency action under Section 404. And it noted that, while Section 505(a)(2) (33 U.S.C. 1365(a)(2)) does permit actions to compel performance of nondiscretionary agency duties, issuance of a Section 404 permit was a discretionary function, properly reviewable under the APA. 557 F. Supp. at 78. The court also stated that the Clean Water Act's citizen suit provision did not preempt an APA action because, under *Sea Clammers*, the savings clause preserved actions under other

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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laws, such as the APA. 557 F. Supp. at 78-79. As we demonstrate above, this portion of its ruling was incorrect. However, that error is of little consequence here since the court's alternative ground for decision was correct.

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